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NEW YORK'S CONSTITUTIONAL CONVENTION.[1]

ARTICLE XIII of the constitution of the state of New York, adopted in 1846, provides that in the year 1866 and every twentieth year thereafter the question shall be submitted to the people: "Shall there be a convention to revise the constitution and amend the same?" In 1866 that question was so submitted, and a convention to revise and amend the constitution was duly held in 1867. In 1886 that question was again submitted to the people, and the vote in favor of such a convention was the most emphatic ever given in the state upon any question as to the revision or amendment of the constitution. Notwithstanding this emphatic vote, the constitutional convention thus ordered has not been held. The fact marks a failure of constitutional government which deserves the thoughtful consideration of the people of the state. In 1832, when South Carolina undertook to nullify a law of the United States, President Jackson issued a proclamation intimating plainly that if such a course were persisted in he would use the whole military power of the nation to enforce submission. In 1861, when a number of the states of the Union attempted to violate and destroy the constitution of the United States, the question was fought out upon the field of battle through one of the bloodiest wars in history until the constitution of the United States was recognized to be supreme. By a simple failure on the part of the governor and the legislature to agree upon details, the constitution of the state of New York, as touching the guaranty which it affords for a periodic constitutional convention, is set aside, and the popular demand of nearly 600,000 voters that such

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a convention should now be held is made of no effect. Can the people of the state of New York afford to consider this situation as a matter of indifference, because it is their own officials who thus jauntily thwart the constitution and refuse to give heed to the popular will?

This is the question in the abstract. Let us consider it for a moment in its details. At the general election of 1886, the people decided by a vote of 575,000 against 31,000 that a constitutional convention should be called. In accordance with the provision of the constitution itself, the two houses of the legislature (the Republican party having a majority in both) united, in 1887, in the passage of a bill to provide for the holding of the convention which had been ordered. This bill the governor vetoed on questions of detail. There the matter has rested until this day. The question, therefore, would appear to be whether, upon questions of detail as to the law under which the convention is to be held, the constitutional guaranty that such a convention shall be held in response to a vote of the people may be set aside. It is true that the same constitution gives to the governor the veto power, and it is through the exercise of this constitutional power residing in the governor that the significant result alluded to has been reached. In my opinion, the result indicates that the use of the veto to prevent the carrying out of the constitutional mandate is a clear abuse of the veto power. That power is a negative power. It gives to the governor the right to say, as to any bill which has passed the legislature: I forbid. Is it not an absurdity to claim that, under such a negative power, the constitution intended to give to one man the opportunity to suspend the operation of the constitution, in its guaranty to the people of the right of a periodic revision of the constitution itself? When the nation found itself involved in the war for the preservation of the Union, some people claimed that unless the Union could be preserved within the methods of ordinary constitutional action it must be allowed to perish. President Lincoln took the much more philosophical view, that it was absurd to suppose that the people of the United States had created a nation which did not have the right to

preserve its own life. Therefore he claimed, and acted upon the claim, that as commander-in-chief of the forces of the United States engaged in a war for the preservation of the Union, he was entitled to exercise, as a war power, whatever power was necessary to preserve the nation's life. The governor's veto of the bill to provide for the holding of the constitutional convention which had been ordered, and his vetoes of the bills in regard to the taking of the census which should have been taken in 1885, proceed upon precisely the opposite theory. According to his action, it is legitimate for one man to hold in suspense, as long as his power lasts, the operation of the constitution in some of its most important provisions.

If this be a proper use of the veto power, the consequences are more far-reaching than the cases to which they immediately apply, important as these are. It is substantially the assertion of a claim on the part of the governor positively to shape legislation. Hitherto, it has been considered that the positive shaping of legislation is a function which pertains to the legislature as such, the relation of the governor thereto being simply to approve or to forbid. When, however, the governor stretches the veto power to the point where he forbids legislation approved of by the legislature for the purpose of carrying out the expressed mandate of the constitution, he practically claims that no legislation of any sort shall be permitted which in its details is not satisfactory to him. In other words, unless the majority in a legislature is sufficient to override a governor's veto, the governor may dictate the form of all legislation which is to become law. I do not believe, for one moment, that such a use of the veto power was contemplated when it was lodged with the governor. It is significant that the governor, when it has suited his convenience to do so, has been very ready to adopt the opposite theory. A few years ago, a bill permitting pools to be sold on race courses passed both houses of the legislature and came to him for action. It was vigorously opposed by many clergymen of the state and by all the element which naturally would sympathize with them, while it was supported, on the other hand, by those who believed it desirable to have such matters regulated

by law. The governor, in permitting the bill to become a law without his signature, filed a memorandum, in which he said that it was the duty of the legislature to decide as to the propriety of such questions, and that he saw no occasion to interpose his veto at that point.

It is true that since the governor vetoed the bill providing for the constitutional convention, he has been re-elected, and the claim may be made that the people have condoned his mistake, if they have not even practically endorsed his position. This claim would be stronger if it were not at the same time true, that the people of the state have since elected a Republican legislature, thus endorsing substantially the attitude taken by that party also. In 1887, immediately after the controversy, a new legislature was chosen which was strongly Republican, the Senate being more strongly so than it had been for many years. Again, in 1888, an Assembly was elected with a larger Republican majority than for a long period. The truth probably is that both governor and legislature were chosen without special consideration of their attitude upon this question. Otherwise we reach the conclusion that the people of the state have done that peculiarly amiable thing — endorsed two entirely antagonistic positions.

While it has been necessary thus to discuss the steps by which the present situation has been reached, it is the present rather than the past that is now of interest. The fact remains that the constitutional convention which was ordered has not yet been held. How then are we to get it? Clearly the duty of further initiative rests with the legislature. It must continue to send up measures providing for such a convention, until some one of those measures becomes law, or until the people appreciate the issue and pass upon it in the election of their governor. It cannot be doubted that, once clearly understood, the position of the legislature will be sustained.

The purpose of this paper is not to show why a constitutional convention ought to be held. The people, acting in a constitutional way, have ordered that it should be held, so that any further reasons for holding the convention would be superfluous.

We have a right to demand of our own authorities that they grant to us the revision of the constitution which the constitution itself guarantees to us. But while it is superfluous to give further reasons for the holding of such a convention than that it is our right to have it, it is not superfluous to point out the disadvantages from which we are suffering by reason of its not being held. Some of these will appear by considering the steps which have led to the insertion into the constitution of the section which provides for a periodic revision. The first constitution of the state, adopted in 1777, contained no provision either for amendment or revision. The constitution of 1821 contained a provision for amendment, but none for revision. The constitution of 1846 (under which, in this particular, we are still living) made provision not only for occasional amendment, but for periodic revision. In other words, starting with a constitution which was assumed to need no amendment, experience has gradually brought the state to appreciate the necessity not only for amendment, but for revision. It is significant that the convention of 1867 maintained the existing provisions of the constitution in this respect, simply relieving them of ambiguity. It has sometimes been questioned whether, under the constitution of 1846, a new convention can be ordered except by a majority vote of all the people voting at that election; and the convention of 1867 proposed to set all doubt upon that point at rest by providing, in explicit terms, that a convention could be called by a majority of all the votes cast with reference to that question. It is true that the constitution submitted to the people by the convention of 1867 was not adopted; but it is significant that the discussions of that convention showed its judgment in this respect to be the same as that of the convention of 1846. The provision for a periodic revision was not inserted in the constitution of 1846 without debate. It was defended on the expressed ground that it asserted the great fundamental principle that all power resided in the people, a principle less likely to be forgotten if, once in twenty years, they might take the power into their own hands and bring the constitution into review without the intervention of any other

body. It was reserved for the present governor to demonstrate, in the year 1887, that all power by no means resides in the people. After full debate, the convention of 1846 determined to provide for periodic revision, by a vote of 89 to 5. Even this does not exhaust its record. An effort was made to have the question reconsidered, but it did not command sufficient strength to secure the calling of the ayes and noes. In the convention of 1867, while there was a division of opinion upon the question whether such a convention should be ordered by a majority of the voters voting at that time, or by a majority of those voting upon that particular question, the committee were able to unite in this statement:

> Your committee are well satisfied that the provisions in the constitution of 1846, both for amendment and revision, are wise and salutary, and ought to be substantially retained.

The chairman of the committee having this matter in charge in the convention of 1867 declared that, with the single exception of the vote in favor of the constitutional convention of 1846, there never had been a proposition submitted to the people of the state, either to amend or to revise the constitution, to call a constitutional convention, or to adopt a constitution, which had commanded a majority of the votes cast at that election for the principal officer then running. In 1826, the vote upon the amendment to remove the property qualification for voting commanded a total vote of 130,000 out of a body of legal voters numbering 308,000. One would have supposed that a question like this would have brought almost every voter to the polls. It is immensely significant, therefore, that in 1886 the vote in favor of a constitutional convention should have amounted to 575,000 out of a total vote for governor of 971,000. It is safe to say, therefore, that the demand for a revision of the present constitution was more emphatic, at that time, than any similar expression on the part of the voters, at any time in the history of the commonwealth. It may, therefore, be contended that one of the chief evils resulting from the existing state of things is that the people are compelled to live along under

the provisions of a constitution which they have emphatically declared to be inadequate.

It is, of course, impossible for any one to say with assurance precisely what impulses moved the people to demand in so marked a way a revision of the constitution, but it is easy to indicate some of the points in which the constitution of 1846 is clearly inadequate for the needs of the present time. Take the question of rapid transit in cities. As we know it to-day, this question dates back to about 1877, so that nothing in the constitution has any direct bearing upon it. The rights of railroad companies in relation to it may be well enough defined by law, but it is at least an open question whether the interests of the municipalities, as such, are or can be sufficiently protected. The whole matter of city government is one that demands careful consideration. Since the constitution of 1846 was adopted, the cities of the state have grown enormously both in number and in size. The intervening years have been fruitful of costly experience, from which much has been learned with reference to the government of cities. Especially is it seen that the habit of interference on the part of the legislature with the detail of city action is full of embarrassment, and, speaking generally, is as bad in its effect upon the legislature as upon the cities. The demand for home rule in cities, at the present time, is by no means a demand for home rule as it was understood in 1846. In that day, cities usually were administered by a common council with very large and complete powers, and a mayor who was merely a figurehead. Experience in the interval has brought our largest cities, as it is bringing the large cities all over the land, completely to reverse this position; so that good city government is now sought through a strong executive and a common council with very limited powers, instead of through a weak executive and a common council with very ample powers. Neither would it be contended by any one that all power with reference to cities should be taken away from the legislature; but there are few, if any, who are familiar with the subject, who do not believe that the constitution might very advantageously limit the right of interference as to details which

now resides in the legislature. Again, it is probable that a still further advance could be made in the direction of covering by general laws many departments of legislation which are still open to special acts of the legislature. Professor Bryce has pointed out how useful a distinction in the method of procedure might be made in the legislature, with reference to public legislation and private legislation. The impulse in favor of a constitutional revision at the present time came very largely from Mr. Henry George and his followers, who were interested in the subject from the standpoint of taxation. There is no doubt that the whole question of taxation would open up as wide a field of discussion as any question with which such a convention would be called upon to deal. Whether Mr. George and his followers are right or wrong, the people of the state have demanded the constitutional convention, and orderly government now requires that the subject should be debated in the halls of such a convention and not be indefinitely shelved. Similarly as to railroads. It is not impossible that the experience of forty years has made clear some points which might profitably be regulated in the constitution. It is conceivable that in the atmosphere of a constitutional convention, where great principles necessarily command attention and provoke discussion, wiser conclusions might be reached on many of these questions than are possible in the hurried and heated discussions of a legislature.

A periodic revision of the constitution also affords the opportunity to take advantage of the experiments of other states in constitution making. New York is only one of forty-two sister commonwealths, in many of which most interesting experiments are being carried on, in their fundamental law as well as in ordinary legislation. The states do learn more or less from each other in matters of ordinary legislation. A revision of the constitution, as opposed to its current amendment, gives the opportunity for a comprehensive survey of the progress of popular feeling and experience all over the Union. Even if the conclusions of the convention are largely set aside by the people, as they were in 1867, the discussions are not for that reason

valueless. One part of the work of the convention of 1867, that relating to the judiciary, was adopted, with important advantages to the commonwealth; and a number of the most salutary amendments which have since been made a part of our fundamental law are the direct outgrowth of suggestions made by that convention.

Of all these advantages, and of many others, we are deprived through the failure of the proper authorities to provide for the convention which the people, in an orderly and constitutional manner, have determined ought to be held. Meanwhile, the situation amounts practically to a violation of the constitution and an annulment of the popular will. When such things happen, they give a blow to the popular respect for government and for law. In the state of New York it is especially important for the citizens to reflect upon this aspect of the matter, because, in consequence of a similar controversy between the governor and the legislature, the enumeration of the people of the state, which ought to have been made in 1885, has not been made. The consequences of this failure are lamentable. Not only is the redistricting of the state into assembly districts on the basis of the new enumeration delayed year after year, but the census, when it comes to be taken, will not be, as it hitherto has been, the record of the tenth year from the preceding census. Thus the regularity is broken into, and all the sociological data which are furnished by the taking of a census at regular intervals are seriously confused. It is doubtful, from this standpoint, whether it is now possible to make a census before 1895 which will not be a source of as great perplexity as service to students of social science.

But apart from all questions of consequences, the important fact remains that through a disagreement of the governor and the legislature in our own state the constitution is set aside, and a failure of orderly government has taken place to which the national government, for example, presents no parallel. It concerns the good name of the state that such things should not be. It is matter of comparatively little concern, from this point of view, whose is the fault as to the past. The duty of

the present is to carry through legislation which shall provide for the constitutional convention, which is our right. The first step in that process is to secure action by the legislature. The second step is to secure the co-operation of the governor. It is to be hoped that the legislature will do its part whether the governor does his or not. In time, if the legislature continues to do its duty, the issue will be made clear — whether the veto power can be properly used to nullify the constitution itself. Meanwhile it is to be hoped, of course, that the legislature will go as far as it can in meeting the objections which have led the governor to adopt the line of action he has hitherto pursued. Whatever may be the theoretical merits of the case, the legislature cannot escape criticism in the forum of common sense if it now fails to try to reach an agreement which shall be satisfactory to both sides in the controversy.

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